IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1145 OF 2007

Cedric D'Silva)
Adult, Indian Inhabitant,)
residing at 19, Colombia,)
St. Domnic Road, Bandra (West))
Mumbai-400 050.)..PETITIONER

Versus

1. Union of India through)
the Under Secretary to the)
Government of India,)
Ministry of Labour,)
New Delhi)
2.The Regional Labour)
Commissioner (Central),)
Shramraksha Bhawan,)
Shivsrushti Road,)
Eastern Express High Way,)
Sion, Mumbai-400 022.)
3.Conciliation Officer & The)
Assistant Labour Commissioner)
Shramraksha Bhawan,)
Shivsrushti Road,)
Eastern Express High Way,)
Sion, Mumbai-400 022.)
4.Jet Airways (India) Pvt. Ltd.)
S.M. Centre, Andheri-Kurla)
Road, Andheri (East),)

Mumbai-400 059)..RESPONDENTS

Mr. Mohan Bir Singh for the Petitioner

Mr. A.C.Singh with Mr. D.A. Dubey, for respondent No.1.

Mr. C.U.Singh, Senior Counsel with Mr. Abhay Kulkarni, Mr. C.M. Mehta, Mr. B. Das, Mr. Mohan Salian i/b. Gagrats for Respondent No.4.

CORAM : F.I. REBELLO &

J.P. DEVADHAR, JJ.

DATED : 2nd November,2007

JUDGMENT (PER F.I. REBELLO, J.):

. The petitioner was working as a Senior Commander with Respondent No.4. By communication of 18th January, 2006the services of the petitioner came to be terminated. The Petitioner thereafter initiated proceedings in conciliation before Respondent No.3. The petitioner and Respondent No.4, appeared before respondent No.3 and stated their respective case. Respondent No.3 thereafter submitted a failure report. The Appropriate Government considering the failure report of 28th February, 2005 was pleased to communicate its decision as under:-

"Capt. Cedric D'silva, Sr. Commander, Jet Airways

not being a workman in terms of Section 2(s) of the ID Act, in view of the duties assigned to him, no ID subsists."

The petitioner being aggrieved preferred a Writ Petition before this Court which came to be disposed of by order dated 22nd January, 2006. This Court considering the material on record and the judgments cited, held that the decision of the Appropriate Government in rejecting the petitioner's demand for reference disclosed total non-application of mind. Considering that we referred the matter back to the respondent No.1 to reconsider the matter.

2. The petitioner subsequent to the order of this Court has received a communication dated 15th February, 2007 which reads as under:-

"Capt. Cedric D'Silva, Senior Commander, Jet Airways, **prima-facie is not a workman** under the ID Act, in view of the predominant nature of the duties assigned to him i.e. managerial/supervisory work. No ID subsists." (emphasis supplied)

It is this order which is the subject matter of the present petition. We may mention that after the order of remand there have been no subsequent hearings before the Conciliation Officer except the fresh decision which has been communicated. While disposing of the first petition we had observed as under:-

"Under Section 12(5) of the ID Act, if the appropriate Government on consideration of the report forwarded by the Conciliation Officer is of the opinion that no industrial dispute exists it may refuse to make reference. In the instant case, as we have pointed out earlier the appropriate Government has prima facie opined that petitioner is not a workman and consequently rejected the claim of petitioner and has refused to make a reference. We have pointed that an order under Section 12(5) of the I.D. Act, though partakes of an administrative order nonetheless, it is still open to this Court to interfere with the said order, if that order discloses non-application of mind or satisfaction is based on irrelevant material or not considering relevant material or without considering the law laid down by Supreme Court and High Courts. We are prima facie of the opinion that the decision of the Appropriate Government in rejecting the petitioner's case for reference discloses total non-application of mind."

3. During the course of hearing as it was contended that the failure report given to the parties was not the failure report, the copy of the Report dated 28th February, 2005 was made available to both the parties. We have had the advantage of going through the said failure report.

. There is no dispute that the petitioner at the relevant time of his termination of services, was working as a Senior Commander. The petitioner by communication of November, 30, 2004 was informed that he was promoted to the next higher Management grade ((Grade V1) and he would be performing training management duties as Check Pilot with effect from acceptance of the letter. To this communication of November 30, 2004 on December, 27, 2004 the petitioner informed the Respondent No.4 that he was agreeable to carry out the additional duties of Check Pilot in addition to his normal and primary duty of line flying. However, he was not agreeable to any change in his status from a workman to the management cadre at present. It was informed that if the intention behind the issuance of the letters under reply was to effect any change in his status as a workman, the same was not acceptable to him. In other words he was not agreeable to his promotion as a Check Pilot if that promotion resulted in he ceasing to be a workman. The Respondent Employer was accordingly asked to act on the same. Subsequent to this communication, by letter dated 18th January, 2005 the petitioner's services came to be terminated.

4. Consequent to the failure of the Conciliation proceedings, the Conciliation Officer submitted the failure report.

. We may now refer to some excerpts from the failure report.

"3). During the course last fifty years from the date when Bind Basini Prasad Award was pronounced, the phenomena of the pilots i.e. ratio of their duties between technical and managerial/supervisory has greatly modified with a sea change. Therefore, the said award has become "outdated" and the judgments based on the said award without discussing the latest changes in the duties of pilot & social and economical pattern in the country are also irrelevant."

4) Subject of law is dynamic and not static. The law keeps its face changing with the different colours from time to time matching with the social and economical changes in the country. The award pronounced fifty year ago, was based on the technology when the pilots were supposed to fly the aircraft as a simple machine i.e. as a driver of a tractor etc. Now, looking to the latest technology and duties of the pilots as framed under the Aircraft Rules (after the said award), the pilots are supposed to pay less attention to the technology/technical work and more attention to supervisory actions and decisions and those decisions are binding on the employer as per rules. This all shows that Pilot/Sr. Commander is a complete institution of management in itself.

5) The word "Pilot-in-Command" and "commander" are the extensions of the word "Command" which has a very natural and nothing is left to be discussed here. In my opinion, the pilot commands the others i.e. man and material, in other words crew and baggage, etc. At a particular time he is wholly and fully responsible for all the aspects at the aircraft.

8) Capt. D'silva in addition to the position of Sr. Commander was also a Check Pilot having vested with wide discretionary powers to pass or fail other pilots including Sr. Commanders and even Chief Pilot.

9) Capt. D'Silva enjoyed benefits under the agreements dated 31st August, 2000 and 30th July, 2004, the increment letter dated 290th July, 2004 clearly mentions conferment of benefits to pilots in accordance with the terms in the memorandum of agreement. Mr. D'silva having accepted the said letter without any protest cannot deny coverage under the agreements. The agreement dated 31st August vide the first para. itself stipulates that pilots are frontline Management staff performing frontline Management functions.

10) The Bind Basani Prasad Award, 1957 is not acceptable for the reason that the Aircraft Rule 141 B was not enforced at the time of pronouncement of

the award and as such duties of Pilot-in-Command were not specified. Evidently, wide powers were conferred on Pilots-in-Command vide amendment of GSR 1087 dated 19-7-65 and Rule 141 which was inserted by Rule GSR 13790 dated 04/06/69.

12.(d) Capt. D'silva has given certain citations in his rejoinder namely:-

(i).....

(ii).....

(iii) In the case of Telco Convoy Drivers Mazdoor Sangh and Anr. vs. State of Bihar and Ors. (1989) 3 SCC 271, it is held that in considering the question whether a reference should be made or not the Deputy Labour Commissioner and/or the government has held that the convoy drivers are not workmen and accordingly, no reference can be made.

The said ratio is of 1989 and stands superseded by the latest judgment pronounced by Supreme Court in the case of Secretary, Indian Tea Association vs. Ajitkumar Barat and others (AIR 2000 SC 919).

15. The position of Indian Airlines, Air India and Jet Airways in not comparable since both the Statutory Corporations have entered into various

Agreements and have been party to several awards pronounced under the provisions of Industrial Disputes Act, 1947, whereas no material has been brought on record in this case of Jet Airways and their pilots being party to any such awards or agreements under the provisions of the said Act.

16. Capt. D'silva has admittedly submitted that the Govt. has shown its intention on the floor of the Parliament in the beginning of the year 2003 (during the crisis of SARS) that pilots are to be excluded from the definition of the 'workman" and the I.D. Act is required to be amended.

17. The Pilots are highly paid employees in the aviation sector. The air transport is a service industry and the same cannot be compared with that of manufacturing industry. The service industry and the competition therein, only depends on the quality of the services which is to be provided by the employees therein. In view of this, highest paid employees in air transport industry should not be treated as 'workman" by any stretch of imagination.

In view of the above analysis, I am of the opinion that the role of the Appropriate Government in deciding the question whether the employee raising the dispute is a workman or not, is not of a mere administrative authority to pas it on to the

judiciary for a decision, but the Govt. has to apply its mind on this basic issue before even deciding to make a reference. In fact, it is a statutory duty of the Government as specified by various judgments of the Supreme Court to arrive at a decision in this respect first and thereafter to decide further.

In view of the ratio of the judgment of the Supreme Court in the case of Secretary, Indian Tea Association (2000), the Govt. has to form an opinion regarding the pilots to be 'non-workman' for the future of this service industry. Accordingly, it is strongly and firmly recommended that the dispute may be declined from making the reference with the following terms."

5. The decision of the Appropriate Government to make or reject a reference is administrative and is based on subjective satisfaction. Section 12(5) of the I.D. Act, however, requires reasons to be recorded. The scope of Section 12(5) was considered by the Supreme Court in Bombay Union Journalists and others vs. The State of Bombay & Anr., AIR 1964 S.C. 1617. The Court observed as under:-

"If it appears that the reasons given show that the appropriate Government took into account a consideration which was irrelevant or foreign, that no doubt may justify the claim for a writ of mandamus. But the argument that of the pleas raised

by the Appellant two have been considered and not the third, would not necessarily entitle the party to claim a writ of mandamus under Article 226."

. In Sharad Kumar vs. Govt. of NCT of Delhi Ors., (2002) 4 SCC 490, the issue was whether an Area Sales Executive is a workman. Reference was rejected on the ground that Area Sales Executive is not governed by the definition of "workman". A petition was filed before the Delhi High Court which was dismissed. The matter was in Appeal before the Supreme Court. While deciding the issue the Court referred to various judgments including Telco Convoy Drivers Mazdoor Sangh vs. State of Bihar & Ors., (1989) 3 SCC 271 where the Court has been pleased to observe as under:-

"It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act.

In deciding the controversy whether the Area Sales Executive would be a workman or not the Court observed:

"As noted earlier determination of this question depends on the types of duties assigned to or discharged by the employee and not merely on the designation of the post held by him. We do not find that the State Government or even the High Court has made any attempt to go into the different types of duties discharged by the respondent with a view to ascertain he came within the meaning of Section 2(s) of the I.D.Act.'

. In The Rajasthan State Road Transport Corporation and Anr. vs. Krishna Kant etc., 1995 LAB. I.C. 2241 it was canvassed before the Supreme Court that the remedies provided under the I.D. Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate government. In that case a Civil Suit had been filed which had been decreed. The defence was that the Civil Court had no jurisdiction. Appeal preferred had been dismissed. On the issue as to whether a suit would be maintainable the Court held that the suit would not be maintainable. While answering the issue canvassed, the Court observed as under:-

The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex facie. The power conferred is the power to refer and not the

power to decide, though it may be that the government is entitled to examine whether the dispute is ex facie frivolous, not meriting an adjudication."

6. The remedy of a person who claims to be a workman in respect of reliefs which can be adjudicated under the I.D.Act is only by resorting to the mechanism under the Industrial Disputes Act, 1947. The Act, therefore, coupled with the power has imposed a duty on the Government, in case of a refusal to make a reference, to record the reasons under Section 12(5) of the I.D. Act. Those reasons must be germane to the issue for consideration and not based on irrelevant material or considerations which are not determinative as to whether the employee is a workman as in the present case. If the appropriate Government only on a prima facie consideration rejects making of a reference, it will deny an employee claiming as a workman the right to get his status decided by a Competent Forum, thus rendering him without a remedy and a forum where he can get a relief of reinstatement, as such a relief can be granted only by an Industrial adjudicator. Prima facie this would by itself contemplate that on material being produced, this prima facie finding can be displaced. In other words a reference cannot be rejected on a prima facie finding.

7. With this background we may now examine the issue involved in this case. That Pilots are workmen is the existing position in law ever since the Industrial Award of

the National Industrial Tribunal Lucknow by Sri Justice Bind Basni Prasad. In answering the issue as to whether a pilot was a workman the learned Tribunal had been pleased to observe as under:-

> "9. The next question which arises is whether pilots, radio officers and the aircraft engineers, drawing more than Rs.500 per month are "workmen" and fall within the purview of this Tribunal. On behalf of the employees it was contended that the pilots, radio officers and the aircraft engineers perform skilled manual or technical work and as such they should be considered as "workmen" irrespective of the salary or wages drawn by them.
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> 10. Taking up first the question of pilots, Shri Vimadalal on behalf of the Corporation stated that in every aircraft the flying crew consists of two pilots, one radio officer and one air hostess or male steward. Sometime in addition there may be a flight engineer or navigator or both. Of that the co-pilot fell within the definition of a "workman", but in regard to the chief pilot, he contended that as he exercised control over the passengers, his position was that of the captain of a ship and he should not be regarded as a "workman".
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> 11. A pilot's main duty is to drive an aircraft. He preforms a highly skilled technical work. The

difference between a driver of the aircraft and that of any other machine e.g. motor car or a steam engine is one of the nature of machine to be driven and one of the nature of the training required for the work. The main work of a chief pilot is to drive the aircraft. All those who have undertaken air journey know it well that he hardly spends any time in exercise of control over the passengers. His position cannot be compared to that of the captain of a ship. A ship contains a much larger number of passengers and greater quantity of cargo. The trip of a ship is much longer in duration than that of an aircraft. A ship has many departments which an aircraft has not, e.g. medical. According to the wage structure given in the Services Committee Report, a senior captain of an aircraft can rise upto Rs.1,550 per mensem. Besides this basic wage, he has many allowances also. He is a technical worker. He does work with his own hands. The definition of workman given in Section 2(s) of the Industrial Disputes Act, 1947 brings within its ambit "any person employed in any industry to do any technical work for hire or reward: irrespective of the salary drawn by him. This is in contradiction with persons employed in a supervisory capacity who fall within the definition of a "workman" only when they draw wages not exceeding Rs.500/- per mensem. I hold that all pilots, whether co-pilot or chief pilot, are "workmen" and they fall within the purview of this

reference."

. This Award and the view taken has been holding the field ever since. The two National Airlines, namely Air India and Indian Airlines (now merged) continue to enter into settlements under the I.D. Act with their Pilots, including senior commanders. In other words in a large Section of the industry they are still considered to be workmen and not doing work which is managerial or supervisory in nature. The order rejecting the reference is on the ground that prima facie the predominant nature of the duties assigned to the petitioner managerial/supervisory. In other words the appropriate Government has proceeded on the basis that the work of senior Commander is both managerial and supervisory and that is the predominant work. Though it holds this to be prima facie, yet has chosen to reject making the reference. If the nature of duties discharged by the employee is multifarious then the further question that may arise for consideration is which of them is his principal duty and which are the ancillary duties performed. Determination of this question is not easy at the stage when the appropriate government is exercising administrative jurisdiction vested in it for the limited purpose of satisfying itself whether the dispute raised is an industrial dispute, whether the employee is a workman and the like. In such a case mere description of an employee is not of much importance and certainly, not conclusive whether the employee is a workman within the meaning of Section 2(5) of the I.D. Act. Normally in such a case a reference ought

to be made when such a question arises for consideration.

7. On behalf of the management their learned Counsel sought to draw our attention to the various material including Agreements entered into with their pilots to contend that Senior Commanders are not workmen, but forming part of their management. In the agreement of 31st August, 2000 no doubt there was a clause which set out that the Pilots are an essential part of the Management team as the Pilots perform front-line Management functions while on board the aircraft and are responsible for maintenance of discipline and control of the crew as well as passengers. The agreement included both Senior Commander as also first officers. In the next agreement of 2004 there is no such reiteration. On the contrary clause 12.0 provides as under:-

> "12.0: The Pilots and their Representatives agree and undertake that they shall conduct their flight duties in accordance with the agreed FDTL and Rostering rules of April 2003 between **Management and the Pilots Representatives,** the implementation of which will be from a mutually acceptable date." (emphasis supplied).

Clause 18 reads as under:-

> "18.0: It is agreed between parties that all existing facilities, benefits of service, rights,

obligations of either party, which are not amended in terms of this agreement will not be adversely affected."

The other contention which was sought to be raised on behalf of the management is based on the Aircraft Rules, 1937 and the Operation Manual. The Aircraft Act and Rules were in force even at a time Justice Beni Prasad award was declared. It is perhaps the operation manual which will have to be considered along with the Act and the Rules.

. The question is whether on account of the subsequent change in the Rules or bringing into force the operation Manual, a pilot including a Senior Commander ceases to be a workmen considering the contention of the management, based on predominant nature of their duties. That issue, in our opinion, could not have been decided by the Appropriate Government considering the judgments which we have referred to and more so considering the contention advanced and urged and answered in the case of Krishna Kant (supra). Apart from that we have reproduced the excerpts from the failure report submitted by the Conciliation Officer which was the basic material on which the appropriate government seems to have formed its opinion which can be seen from the communication of 15th February, 2007 rejecting the reference. Prima facie the inference drawn and many of the reasons given in the failure report would be either totally erroneous or irrelevant for deciding as to whether the predominant nature of duties of a Senior Commander are

managerial or supervisory.

9. In Bombay Union of Journalists and ors.(supra) the Supreme Court has noted that it is open to the appropriate Government to prima facie consider the merits of the dispute and take into account other relevant considerations which will help to decide whether making the reference would be expedient or not. Having said so the Court then observed as under:-

> "It is true that if the dispute in question raises questions of law, the appropriate Government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal."

In so far as the validity of the reasons are concerned, the Court observed as under:-

> "If it appears that the reasons given show that the appropriate Government took into account a consideration which was irrelevant or foreign, that no doubt, may justify the claim for a writ of mandamus. But the argument that of the pleas raised by the Appellants two have been considered and not

the third, would not necessarily entitle the party to claim a writ under Article. 226."

The Supreme Court in that case also held as under:-

" If the appropriate Government refuses to make a reference for irrelevant considerations, or on extraneous grounds, or acts mala fide, that, of course, would be another matter; in such a case a party would be entitled to move the High Court for a writ of mandamus."

. In Prem Kakar vs. State of Haryana and Anr. (1976) 3 S.C.C.433 on the facts there, the the Government found that the Appellant was not a workman within the definition of workman. The order rejecting the reference was upheld. Reference was also made to the Secretary Indian Tea Association vs. Ajit Kumar Barat & Ors., (2000) 3 SCC 93. After referring to the various judgments the Supreme Court has reiterated the well settled position that before making a reference under Section 10 of the Act the appropriate Government has to form an opinion whether an employee is a workman and thereafter has to consider as to whether an Industrial dispute exists or is apprehended. In Mahabir Jute Mills Ltd., Gorakhpore vs. Shri Shibban Lal Saxena & Ors., (1975) 2 SCC 818 the Supreme Court noted the existence of what is called a secret report. The Court held that there was no reason to exclude the secret report. The failure report made available to the parties has been

annexed to the petition.. That only notes as under:-

> "After lengthy discussions and in spite of best possible efforts, it was observed that there was no possibility/scope of any amicable resolution of the matter before the Conciliation Officer looking to the divergent views and opinions of the parties. Therefore, proceedings ended in failure."

It is in the so called "Secret Report" that the Conciliation Officer has stated the case of failure of Conciliation. One of the reasons given in the failure report is that the judgment in Telco Convoy Drivers Mazdoor Sangh (supra) is no long good law considering the judgment of the Supreme Court in Secretary, India Tea Association & Ors. (supra). Firstly, both the judgments are of the coordinate Benches of the Supreme Court. Secondly the law as declared in Telco Convoy Drivers Mazdoor Sangh (supra) is the same as set out in Secretary, Indian Tea Association. In Telco Convoy Drivers Mazdoor Sangh (supra) it was urged that unless relationship of employer and employees or, in other words, unless those who are raising the disputes are workmen, there cannot be any existence of industrial dispute. In dealing with that aspect the Supreme Court has observed that :-

> "Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate

> government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See Ram Avtar Sharma v. State of Haryana, M.P. Irrigation Karmachari Sangh v. State of M.P.; Shambhu Nath Goyal v. Bank of Baroda, Jullundur."

The judgment nowhere lays down that it is not open for the Government to prima facie consider as to whether a dispute exists. What cannot be done on contested material is to arrive at a conclusion that a person is a workman or not. The judgment in Secretary, Indian Tea Association only reiterates the existing position that it is open to the appropriate Government to prima facie consider the material as to whether there exists an industrial dispute. If such a power is not conferred then in every case the Government would have no choice but to make a reference.

10. Having considered the facts on record and the propositions of law which have been canvassed we may now note, that in our earlier order we had held that the first order rejecting the reference discloses non-application of mind. On the matter being referred back to the appropriate Government the same material which was available including the same secret report was considered. The same reason has

been given except this time it was set out that prima facie the predominant nature of the duties assigned was managerial/supervisory. The excerpts from the secret report themselves have been set out as can be seen some of the recommendations are totally irrelevant to decide whether the petitioner was a workman or not. It is not possible to know which reasons weighed with the Government. Even otherwise assuming that the material had been placed by Respondent No.4 before the Conciliation Officer as the reference is rejected on the prima facie finding of ground of predominant activities, that would be an issue to be decided not by the appropriate Government, but by the Industrial adjudicator. In what manner a pilot who has to discharge certain statutory functions as incharge of the aircraft, cease to be a workman is an issue which will have to be considered, whilst applying the predominant test of nature of duties.

11. In the instant case we had earlier set aside the order of reference and referred the matter back to the appropriate Government for reconsideration. The appropriate Government has once again rejected the reference. Considering the prima facie conclusions we have arrived at and considering the judgment of the Supreme Court in Hindustan Steel Works Construction Ltd. vs. Employees Union, (2005) 6 SCC 725 and the judgment in Chairman, Oil & Natural Gas Corporation Ltd. & Anr. vs. Shyamal Chandra Bhowmik 2006 1 CLR 18, we are of the opinion that this would be a fit case where we direct the appropriate Government to

make reference to the Central Industrial Tribunal on the following question:-

"Whether on the facts and circumstances Cedric D'Silva is a workman and if so whether his termination is illegal and consequently what relief he is entitled to?"

. Rule made absolute accordingly. No order as to costs.

(J.P. DEVADHAR, J.) (**F.I. REBELLO**, J)